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No.

Supreme Court of the United States

October Term, 1980

IRIS CARTER,
Petitioner,

vs.

DAYTON BOARD OF EDUCATION

and

JOHN E. MAXWELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Is a private suit by an employee against her employer for alleged sex discrimination in promotions authorized by Title IX of the Education Amendments of 1972, Title 20, U.S.C. §1681, when it is established that the employer, an educational institution, is the recipent of federal financial assistance which is deposited to the general revenues of the recipient institution and is used by the institution to defray a portion of the salaries of its employees?

2. Was the evidentiary burden imposed upon plaintiff inconsistent with this Court's recent decision in *Texas Department of Community Affairs v. Burdine*?

3. Did the Court below err in holding that respondent had articulated a legitimate nondiscriminatory reason for failing to promote petitioner or that petitioner failed to demonstrate that respondent's reasons were pretextual?

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PETITION FOR WRIT OF CERTIORARI
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For the Sixth Circuit

Petitioner Iris Carter prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in the above entitled case on March 17, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not reported. It is set forth in the Appendix at pp. A1-A4. The Judgment and Order of the United States District Court for the Southern District of Ohio accepting the recommendations of the Master is set forth in the Appendix at pp. A5-A7. The Report and Recommendation of the magistrate is set forth in the Appendix

at pp. A8-A35. The Order of the District Court dismissing various aspects of Plaintiff's Complaint is set forth in the Appendix at pp. A36-A37.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered March 17, 19[illegible] The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a) provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> **(1) Classes of educational institutions subject to prohibition**
>
> in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> **(2) Educational institutions commencing planned change in admissions**
>
> in regard to admissions to educational institutions, this section shall not apply (A) for one year from

June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher ed-

ucation which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Iris Carter brought suit against her employer the Dayton Board of Education and John E. Maxwell, Superintendent of Schools, on December 23, 1977. Ms. Carter alleged, *inter alia*, that the Superintendent and the Board had failed to promote her to the position of elementary principal because of her sex. She sought relief pursuant to both Title VII of the Civil Rights Act of 1964, as amended, Title 42 U.S.C. §2000e et seq. and Title IX of the Education Amendments of 1972, Title 20 U.S.C. §1681. The jurisdiction of the district court was invoked under Title VII, Title IX and Title 28 U.S.C. §§1331, 1343.

Prior to instituting this action, Ms. Carter had exhausted all available administrative remedies, having filed charges of discrimination with both the Equal Employment Opportunity Commission and the Office for Civil Rights of the Department of Health, Education and Welfare.

In January, 1978, the Defendants moved to dismiss the Title IX aspect of Plaintiff's complaint arguing that the district court did not have jurisdiction over private suits to enforce Title IX. Relevant to this motion, Plaintiff filed numerous affidavits and exhibits describing the extent of the federal financial assistance received by the Defendants and the manner in which this money was expended.

In its order of June 21, 1978, the district court concluded that Title IX "does not create a private right of action for redress of employment discrimination" (A36). That allegation of Plaintiff's complaint was thereby dismissed.[1]

On October 13, 1978, the case was assigned to a magistrate "to hold hearings, receive evidence and report to the Court."

Trial was had to the magistrate in November, 1978, and in February, 1979, the magistrate filed his Report and Recommended Decision with the Court (A9). The magistrate found that, under the test outlined in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979), Ms. Carter had established a prima facie case of sex discrimination with regard to the failure to promote her to principal in 1974. The burden of going forward thus shifted to the Defendants to articulate a legitimate non-discriminatory reason for their actions.

After outlining the reasons stated by Superintendent Maxwell for making his decision (A22-23), the magistrate concluded that the Defendants had met their burden of articulating a legitimate reason for failing to promote Ms. Carter.

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1. Plaintiff's complaint was filed as a class action. It included allegations that the Defendants discriminated against women as a class by failing to promote them to administrative positions and through the application of its salary system. However, as discovery progressed, it became apparent that certain of the allegations of the complaint, as well as the class action allegations, had no factual support and therefore were dropped from the litigation. Cf. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (Plaintiff may be assessed her opponent's attorney's fees if she continues to litigate a claim after it becomes groundless).

Turning to the question of pretext, the magistrate concluded that Ms. Carter had offered no evidence to establish that the reasons given by Superintendent Maxwell for not promoting her were pretextual. Rather, the magistrate understood the Plaintiff to have relied solely upon certain statistical summaries to carry her burden of persuasion. Finding that these summaries were "unreliable", the magistrate concluded that Plaintiff had failed to meet her burden of persuasion and recommended that judgment be entered in favor of the Defendants.

Plaintiff filed a timely motion to review the Report and Recommendation of the magistrate along with objections to that Report. In addition to the contention that numerous critical findings of fact were clearly erroneous, Plaintiff challenged the application of the law to the facts as found. At a hearing held on this motion before United States District Judge Carl Rubin, Plaintiff raised two issues of law. Because *Cannon v. University of Chicago*, ... U.S. ....., 99 S. Ct. 1946 (1979) had recently been decided, Plaintiff moved orally to reconsider the court's order of June 21, 1978, which dismissed the Title IX aspects of her case. Furthermore, because of certain implications arising from the testimony and the findings of fact of the magistrate, Plaintiff moved, pursuant to Rule 15, Fed. Rules Civ. Proc., to amend her complaint in order to conform to the evidence to include allegations of violations of the Fourteenth Amendment as well as Title 42 U.S.C. §§1981, 1983, 1985 and 2000d.

On May 31, 1979, the district court, in a one page order, accepted the recommendations of the magistrate and entered judgment for the defendants. The court did not comment upon Plaintiff's motion to reconsider or to amend.

On appeal, Plaintiff argued that certain key facts were clearly erroneous, that the court had erred in applying

the Title VII standards to the facts and that the court erred in failing to reinstate the Title IX case of action.

The court of appeals, in an order entered by the clerk, affirmed the judgment of the district court (A1). With regard to the dismissal of the Title IX claim, the court ruled on the basis of *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972, 100 S. Ct. 467 (1979), that Title IX applies only to students involved in programs or activities receiving federal financial assistance and does not create an implied right of action for sex discrimination on the part of the employees of educational institutions receiving such assistance.

With regard to the Title VII allegations, the court found that while some of the findings of fact had uncertain support in the record, the record as a whole supported the conclusion that the decision not to promote the Plaintiff was based upon legitimate, non-sexually discriminatory reasons.

REASONS FOR GRANTING THE WRIT

1. This Petition Raises Important Issues Similar to Ones Presently Pending Before This Court

The courts of appeals are at present in conflict on the question of whether Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in any educational program or activity which receives federal financial assistance, is available for the redress of discrimination in employment. *Compare, Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979); *Islesboro School Committee v. Califano*, 593 F.2d 119 (1st Cir. 1979); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979); *Seattle University v. United*

States Department of Education, 621 F.2d 992 (9th Cir. 1980); with *North Haven Board of Education v. Hufstedler*, 629 F.2d 773 (2nd Cir. 1980); *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980).

While this Court has previously denied petitions for certiorari in *Romeo, cert. denied*, 444 U.S. 972 (1979); *Islesboro, cert. denied*, 444 U.S. 972 (1979); and *Junior College, cert. denied*, 444 U.S. 972 (1979), it recently granted certiorari in *Seattle University, cert. granted*, ... U.S. ....., 101 S. Ct. 563 (1980) No. 80-493 and *North Haven, cert. granted*, ... U.S. ....., 101 S. Ct. 1345 (1981) No. 80-986. (A petition for certiorari is presently pending in *Dougherty, petition for cert. filed* December 22, 1980, No. 80-1023.)

Because of the procedural histories of *Seattle University* and *North Haven*, the questions presented for review in those cases relate primarily to the authority of the Department of Education to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance. These questions necessarily must focus to some degree upon a reading of §902 of the Education Amendments of 1972 which authorizes the issuance of rules and regulations to effectuate the provisions of Title IX as well as providing for the procedure to be followed in the event the termination of federal financial assistance becomes necessary.

The present petition, however, raises an issue which is supplemental to those under consideration in *Seattle University* and *North Haven*, but of equal importance: May an individual bring a private suit pursuant to Title IX to challenge her employer's employment policies?

Private actions brought to enforce Title IX, in comparison to systemic suits spearheaded by the Department

of Education, are generally more narrow in their focus. Individuals are seeking relief for their particular injury rather than the total cutoff of all federal financial assistance to the educational institution. This Court recognized this difference in *Cannon v. University of Chicago*, ... U.S. ....., 99 S. Ct. 1946, 1965 (1979).

While the court of appeals did not elaborate upon its reasons for denying Petitioner the right to pursue her Title IX remedies, the reference to *Romeo* establishes the scope of its opinion. The court of appeals has held that under no circumstances can the employment practices of an educational institution be subject to scrutiny under Title IX since that statute was designed to benefit only students enrolled in recipient institutions. This construction of Title IX is contrary not only to the decision of the Second Circuit in *North Haven*, which found that all employees of recipient institutions are protected from discrimination by Title IX, but also conflicts with the decision of the Fifth Circuit in *Dougherty* which, although ruling that the Department of Education exceeded its authority in issuing the employment regulations, did recognize that jurisdiction over employment practices may lie on behalf of those employees whose salaries are defrayed by federal funds. 622 F.2d at 738. This conflict with the *Dougherty* opinion becomes more glaring when the facts of the present case are further examined.

In response to the Defendants' motion to dismiss Petitioner's Title IX allegations, Petitioner filed various affidavits and exhibits which detailed the federal grants and programs operating within the Dayton School System. These documents established that the Dayton School System receives substantial federal financial assistance which is utilized for employment purposes. For the 1974-1975 academic year alone $458,000 in federal impact funds,

received through the impacted areas program (Title 20 U.S.C. §236), was deposited in the general operating funds of the system and ultimately used in part to defray salaries. Neverthless, the court of appeals ruled that "the fact these federal monies went into the school system's general fund, does not provide an adequate basis for the court to depart from [its decision in *Romeo*]." (A2).

Petitioner prays that a writ of certiorari issue with regard to question 1 and that a briefing schedule be established which will allow it to be considered in conjunction with *Seattle University* and *North Haven*. In the alternative, petitioner prays that this Court defer judgment on this aspect of the petition pending a ruling in those cases.

2. The Decisions Below Conflict With Recent Decisions of This Court

In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court set forth the basic allocation of burdens and order of analysis of proof in a Title VII case alleging discriminatory treatment. Initially the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Should the plaintiff succeed in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employment practice being challenged. Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

Of course, this does not mean that all Title VII trials must proceed in these steps. The *McDonnell-Douglas* test is merely a convenient means of analyzing evidence and

is not meant to limit the focus of the court to any portion of the proceedings. *Texas Department of Community Affairs v. Burdine,* ..... U.S. ...., 101 S. Ct. 1089, 1095 n.10 (1981).

In *Burdine,* this Court further clarified the burden which is placed upon a defendant following the establishment of a prima facie case of discrimination. In order to rebut the presumption of discrimination, the defendant need only produce evidence that the plaintiff was treated as she was on the basis of a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons; however, the reasons must be established through the introduction of admissible evidence. An articulation not admitted into evidence will not suffice. *Id.* at 1094.

Once the defendant carries this burden, the presumption is rebutted and the inquiry turns to the pretext stage. We are taught that evidence which may be relevant to a showing of pretext includes facts as to the treatment of other similarly situated individuals, factual inconsistencies between the articulated reasons and the defendant's actions, as well as the defendant's general policy and practice with respect to minority employment (including statistics), which may be helpful in exposing a general pattern of discrimination against minorities or other protected groups. *McDonnell-Douglas, supra* at 804-805. *Burdine* further explains that, because of the liberal discovery rules and the accessibility of the investigatory file of the Equal Employment Opportunity Commission, a plaintiff should not find it particularly difficult to prove that a proffered explanation which lacks a factual basis is pretextual. *Burdine, supra* at 1096.

When the opinions of the district court and court of appeals are examined in light of *Burdine* it is evident that they erred in applying the Title VII test.

A. Factual errors relevant to pretext

On appeal Petitioner alleged that certain critical facts as found by the magistrate were clearly erroneous. The court of appeals held that, while these findings of fact may have had uncertain support in the record, the record as a whole supported the magistrate's conclusion that the decision not to promote the Petitioner was based upon legitimate, non-sexually discriminatory reasons. Petitioner contends that the court of appeals failed to understand the critical nature of the challenged factual findings and therefore erred in reaching its conclusion that the magistrate's decision was correct. Three instances are illustrative.

(1) At trial, Petitioner testified that, in response to her request to be considered for a principalship, she was interviewed by Superintendent Maxwell. At this interview, Maxwell informed Ms. Carter that she was the wrong color for the promotion. After she reminded the Superintendent of her background with the Dayton School System and her qualifications and interest in the job, the Superintendent again told her that he was sorry but that she was just the wrong color for the position (Transcript p. 29). When asked about this interview on the stand, Defendant Maxwell agreed that the Petitioner's description of the interview was accurate (Transcript p. 149). In actuality, Petitioner was not "the wrong color" as the white male who received the promotion that year is of the same race as Petitioner. It was this promotion which formed the basis of Petitioner's charges of discrimination which were filed with the EEOC and HEW. The magistrate apparently ignored this testimony, concluding that "Plaintiff testified that two of her *transfers* resulted from a desire of the Maxwell Administration to equalize the racial balance in the Dayton school system." (A16) (Em-

phasis added). Petitioner contends that this error, left uncorrected by the court of appeals, seriously restricted Petitioner in her ability to establish pretext.

(2) The magistrate found that Superintendent Maxwell had been responsible for numerous promotions of women to administrative positions (A18). This fact, of course, is relevant to pretext in that it relates to the general policy and practice of the Maxwell Administration toward the promotability of women. However, as pointed out to the court of appeals, and admitted by Superintendent Maxwell on the stand (Transcript pp. 648-703), this finding confuses initial appointments with promotions as well as credits the Maxwell Administration with promotions which were actually made by a previous administration. Petitioner had never complained about the treatment which she had received prior to the Maxwell Administration. However it was her contention that Superintendent Maxwell was opposed to the promotion of women to the position of elementary principal. This was evidenced by the fact that, of the more than 20 principalships filled by Superintendent Maxwell, all have been filled with men. By failing to resolve these conflicts, the court of appeals incorrectly gave the Respondents the benefit of a factual finding which has no support in the record.

(3) The magistrate concluded that there were reasons why Superintendent Maxwell did not promote Petitioner. Included among these reasons was Superintendent Maxwell's understanding that unspecified but allegedly unfavorable information had been removed from the Petitioner's personnel file, and his understanding that the Petitioner had had difficulty disciplining students. However, when these reasons were advanced at trial by Defendant Maxwell to justify his decision not to promote the Petitioner, the magistrate recognized their hearsay nature and

sustained an objection to this evidence. Nevertheless, the magistrate, and apparently the court of appeals, were both of the opinion that if the employer believes a fact to be true, regardless of whether or not it is, that misplaced belief can form the basis of a legitimate, non-discriminatory reason for denying an employee a promotion. Petitioner contends that not only did the courts below confuse facts with hearsay, but they also failed to comprehend the significance of that distinction to the question of pretext. *Burdine, supra* at 1094 ("the defendant must clearly set forth, *through the introduction of admissible evidence,* the reasons for plaintiff's rejection.") (Emphasis added).

B. Evidentiary errors

Between the time that Petitioner filed her charges of discrimination with the EEOC and HEW in July, 1974, and the trial of this matter in the fall of 1978, substantial investigations by both the EEOC and HEW occurred. As part of these investigations the Respondents had prepared numerous documents. These documents included material which was relevant to Ms. Carter's allegation, as well as general information relating to the pool of women eligible for and interested in promotion to principalships. Certain of these documents were summaries of the voluminous personnel files which are maintained by the Dayton school system. They included the EEO-5 forms which are required to be maintained by educational employers (Chapter XIV, Title 29, Code of Federal Regulations, Subpart L, §1602.39), a school by school analysis of the principalship appointments made from 1972 through 1976 with indications of the race and sex of those individuals appointed, a 1975-1976 eligibility list of those who at that time held certification for elementary principal, a list of individuals who requested promotion from 1972 through 1976 indicating the race and sex of each individual and a list of

all individuals appointed to principalships from 1972 through 1977 indicating the school to which each individual was assigned and the date of said appointment.

During the preparation for trial these documents and summaries were examined by both parties and they ultimately became joint exhibits. At trial these exhibits were also the subject of a stipulation as to authenticity and accuracy.

On the basis of these exhibits Petitioner sought to establish that the exercise of Superintendent Maxwell's judgment in making promotions resulted in the total exclusion of women from principalships.

In addition to these joint exhibits the Respondents introduced new compilations, prepared just prior to trial, which conflicted with the documents previously provided to the EEOC and HEW. Because of these inconsistencies and the belief that the joint exhibits were not business records of the Respondents, the magistrate concluded that they were of no evidentiary value (A30-31).

Petitioner contends that this ruling is erroneous in light of the recent decision in *Burdine*. *Burdine* makes clear that inconsistencies between materials submitted to the EEOC during an investigation of a charge of discrimination and an "articulated" defense at trial can be probative of pretext. *Burdine, supra* at 1096. However, both the magistrate and the court of appeals concluded that such inconsistencies mandated the total exclusion of the evidence. If indeed this is a correct reading of this Court's decision in *Burdine*, then not only will plaintiffs find pretext difficult to prove, it may in many instances be impossible. The inconsistency and unreliability of the records of an employer when conjoined with a totally subjective decision making process, requires a more sensitive exam-

ination of pretext than that accorded by either the magistrate or the court of appeals.

Petitioner prays that a writ of certiorari issue with regard to question 2 and 3. In the alternative, Petitioner prays that this Court reverse the judgment of the court of appeals and remand this case to the district court for reconsideration in light of *Burdine*.

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 17, 1981)

No. 79-3520

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IRIS CARTER,
Plaintiff-Appellant,

v.

DAYTON BOARD OF EDUCATION and JOHN E. MAXWELL, Superintendent,
Defendants-Appellees.

ORDER

BEFORE: WEICK and ENGEL, *Circuit Judges;* and BOYLE,* *District Judge.*

Plaintiff Iris Carter, a white female, employed by the Dayton Board of Education since 1965, appeals a judgment of dismissal of her suit brought in the district court claiming that she was sexually discriminated against by the Dayton Board of Education's failure to promote her to the position of elementary school principal in 1974 and subsequent years. Following an extensive trial before a magistrate, numerous findings of fact and conclusions of

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*The Honorable Patricia J. Boyle, United States District Judge for the Eastern District of Michigan, sitting by designation.

law were issued. These, in turn, were adopted by the district judge and became the basis for the judgment in favor of the defendants, from which this appeal is taken.

At the outset, plaintiff alleges that the district court erred in dismissing her claim for relief under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.* (1976). Our circuit, however, has clearly ruled that Title IX applies only to students involved in programs or activities receiving federal financial assistance and does not create an implied right of action for sex discrimination on the part of the employees of educational institutions receiving such assistance. *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979). The emphasis that Ms. Carter places upon the greater amount of federal financing received by the Dayton school system in comparison with that present in *Romeo Community Schools*, and upon the fact that these federal monies went into the school system's general fund, does not provide an adequate basis for the court to depart from that decision.

With respect to her claim brought under Title VII of the Civil Rights Act, plaintiff Carter asserts that the judgment was improperly rendered in favor of the Dayton Board of Education upon the basis of numerous findings which were clearly erroneous. Further, plaintiff contends that the magistrate erred in concluding that certain joint exhibits, which were the subject of stipulation and to which neither party objected, were unreliable and of no evidentiary value. Finally, plaintiff claims that the magistrate erred in applying the appropriate case law to the facts here with respect to requirements of proof of disparate treatment under Title VII. Specifically, plaintiff claims that defendants failed to rebut her prima facie case of sexual discrimination by sufficient evidence that the failure to promote her to the position of elementary

principal, and the promotion of men to that position instead, was based upon legitimate non-discriminatory reasons.

Our careful review of the record shows that a few of the extensive findings of fact may have uncertain support in the record. The record as a whole, however, supports the magistrate's finding that the decision not to promote the plaintiff was based upon legitimate, non-sexually discriminatory reasons. In particular, it appears that although plaintiff was educationally qualified for the post, Superintendent Maxwell did not have the same degree of confidence in her abilities as did Dr. Carle, whom he replaced in July, 1973. The record shows that this lack of confidence did not relate to plaintiff's sex; it fundamentally related to the parties' differing philosophical attitude toward the position as an educator and toward different policies instituted by Superintendent Maxwell upon taking office. This was particularly true with respect to plaintiff's attitude toward school discipline. Additionally, Maxwell quite evidently was concerned that plaintiff had at least some difficulty maintaining student discipline and getting along with other teachers, parents and students.

While plaintiff vigorously defends her record and asserts that any finding of comparative deficiencies on her part is clearly erroneous, we are unable to agree. It was not for the magistrate or for us to determine the merits of Superintendent Maxwell's claims. It is sufficient that these reasons, and not sexual discrimination, provided the basis for plaintiff's failure to be promoted.

The magistrate's decision to reject the stipulated statistical evidence was not based so much on the inaccuracy of the data as it was on the limited value of its use because of the manner in which it was presented. He found that the sample group contained in the data was

insufficient in number to enable any statistically reliable evaluation of the alleged discrimination. The magistrate also found that the data base was inappropriate. The exhibits sought to compare the number of women promoted to elementary principalships with the total number of women employed by the Board, rather than with the total number of women who met the objective qualifications for the position. The weight and credit to be given this evidence, as indeed with any other evidence in the case, is a matter for the finder of fact and is subject to the clearly erroneous rule. Plaintiff has not shown that the magistrate's decision on this matter was clearly erroneous. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed May 31, 1979)

No. C-3-77-438

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION, *et al.*

JUDGMENT

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, and that the complaint herein is hereby DISMISSED.

JOHN D. LYTER
Clerk of Court
By: /s/ REBECCA E. ANDERSON
Deputy

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed May 31, 1979)

No. C-3-77-438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendant.

ORDER

This matter is before the Court pursuant to reference to the United States Magistrate as a special master pursuant to 28 U.S.C. §636(b)(2), Rule 53 of the Federal Rules of Civil Procedure, and §1.5(1) of Western Division Rule No. 1 in the United States District Court for the Southern District of Ohio. Pursuant to such reference the Magistrate held hearings at which evidence and testimony were presented and filed with this Court Findings of Fact and Recommendations for Disposition.

Rule 53(e)(2) contains the following:

> In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous.

The term "clearly erroneous" has been defined by the Supreme Court of the United States in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) as follows:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

After a review of the comprehensive findings of the Magistrate, after review of the pleadings in this matter, and after hearing in open court, this Court does determine that the Findings of Fact are not clearly erroneous, and are hereby accepted.

Pursuant to the Recommendations of the Master, judgment is hereby entered in favor of the defendant.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

NOTICE OF THE UNITED STATES DISTRICT COURT

(Filed February 14, 1979)

Case No. C-3-77-438

IN THE UNITED STATES DISTICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION,
et. al.,
Defendants.

NOTICE

Attached hereto is the Report and Recommended Decision of Honorable Robert A. Steinberg, United States Magistrate which was filed on February 14, 1979. Any party may object to the Magistrate's findings, recommendations and report within ten (10) days after being served with a copy thereof. Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk

a transcript of the specific portions of any evidentiary proceedings to which an objection is made.)

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served with a copy thereof.

REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT

(Filed February 14, 1979)

Case No. C-3-77-438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This case is before the Court after trial on the merits and extensive post-trial briefs filed by both parties. Plaintiff claims that, during the 1974-1975 school year, Defendants discriminated against her because of her sex by refusing to appoint her to the positions of principal and assistant principal and by demoting her to the position of

teacher. Plaintiff also alleges that Defendants maintained a salary system which resulted in unequal treatment of females. Plaintiff filed this case as a class action but later withdrew her class action claims. Defendants claim that there was no inequality in pay, that Plaintiff was not demoted as a result of sex discrimination and that Plaintiff was not denied the positions of principal and assistant principal as a result of sex discrimination. Defendants claim that Plaintiff was not promoted to principal because she was not as qualified for that position as other candidates.

During the trial, Plaintiff offered no evidence in support of her claims that females received unequal pay, that she was demoted as a result of sex discrimination, and that she was denied an assistant principalship as a result of sex discrimination. The only claim upon which Plaintiff offered evidence was her claim that she was denied a principalship because of sex discrimination.

FINDINGS OF FACT

1. Plaintiff, Iris Carter, is a Caucasian female who is presently a fifth grade teacher at Whittier Elementary School, Dayton, Ohio.

2. Plaintiff has a Bachelors Degree in Elementary Education from Ohio State University. She has a Masters Degree in Human Growth and Development with a minor in Montessori Education from Xavier University. In addition, she has engaged in graduate studies in the fields of Educational Administration and Clinical Psychology at the University of Dayton, Wright State University, the Gestault University of Cleveland and LaVerne College.

3. Plaintiff has a permanent teaching certificate, an elementary principal's certificate, an elementary supervisor's certificate, an educational administrative specialist

certificate and a superintendent's certificate. Plaintiff is therefore qualified to become an elementary school principal.

4. Plaintiff was first employed as an elementary school teacher by the Dayton Board of Education for the school years 1965-1966 and 1966-1967. Plaintiff thereafter resigned to accept a position as teacher in the West Carrollton school system for the 1967-1968 and the 1968-1969 school years.

5. In the 1969-1970 school year, Plaintiff returned to the Dayton school system as an assistant principal at Westwood Elementary School.[1] Plaintiff's duties included disciplinary responsibility for fourth through eighth grade female students and for the staff. At that time, Dr. Wayne Carle was superintendent of the Dayton Board of Education (hereinafter referred to as the Carle Administration).

6. In the 1970-1971 school year, Plaintiff was transferred to become a supervisor in the Curriculum Department because one of the three assistant principal positions at the Westwood Elementary School had been eliminated. As supervisor, Plaintiff was initially assigned seven schools to work with and later the number was increased to fifteen. Plaintiff's duties involved implementation of the Carle Administration's programs, including the Individually Guided Education Program (IGE). During the summer of 1971, Plaintiff was employed as principal at the summer

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1. Despite the fact that Plaintiff was immediately employed as an assistant principal upon her return to the Dayton school system in the fall of 1969, she has alleged both in her Complaint (pg. 5, ¶ 30) and in her Final Pretrial Order (pg. 2, ¶ IV.A.1) that she was discriminated against by not being promoted to assistant principal. Plaintiff received further assignments as assistant principal in later years, as reflected in the findings of fact, infra. During the years she was not assigned as assistant principal, she made no application for said position. These specious allegations reflect unfavorably upon the credibility of Plaintiff's case.

school at Huffman Elementary School for the purpose of training the principal and staff of Fairport Elementary School to implement the IGE Program that fall.

7. In the 1971-1972 school year, Plaintiff was assigned to the Fairport Elementary School as assistant principal responsible for implementing the IGE Program. At the conclusion of that school year, she was advised by her superior that she was being removed from her position and placed into the Curriculum Department. Plaintiff was informed that the reason for her transfer was "that there was [sic] some dissatisfied parents in the community with me who were politically aligned with the conservative SOS group and that it was for my well-being that I be removed from the building and placed into curriculum with supervisory staff again."

8. During the 1972-1973 school year, Plaintiff was coordinator for the Executive Teacher Program at the Westwood and Gardendale schools, working under Dr. Violet Strahler. In January 1973, the principal of Shiloh Elementary School underwent surgery and was absent on sick leave. Plaintiff was transferred to that school as assistant principal and worked there the remainder of that school year performing the duties of an acting principal. There were no other assistant principals at the Shiloh Elementary School at that time.

9. In July of 1973, a new administration under Superintendent John Maxwell assumed control of the Dayton Board of Education (hereinafter referred to as the Maxwell Administration). At the time of the trial, Mr. Maxwell had been in the Dayton school system for 36 years. He holds a life certificate for secondary school principal, professional certificate for superintendent, elementary principal certificate, and special certificates for physical education and industrial art. The Maxwell Administration em-

phasized an approach to education which was different from that of the Carle Administration. Mr. Maxwell referred to it as the "Back to Basics" program.

10. The administrative promotions for the 1973-1974 school year were determined by the Carle Administration and, for the most part, were implemented by the new Maxwell Administration.

11. Plaintiff accepted a contract as supervisor in the Curriculum Department for the 1973-1974 school year. However, Plaintiff was assigned the non-supervisory job of unit facilitator, but was paid at the highest level possible in the Curriculum Department. This came about because Plaintiff had been performing as an acting principal under the Administration Department while technically employed in the Curriculum Department. Therefore, each department lost track of Plaintiff and believed her to be in the employ of the other department. As a result, all of the positions in the Curriculum Department had been filled by the time Plaintiff accepted her contract. This mistake was legitimate and unintentional and did not prejudice Plaintiff financially. Plaintiff's duties as a unit facilitator included assisting teachers with mathematics and reading programs and assisting principals in curriculum matters.

12. From the 1969-1970 school year through June 1973 Plaintiff was considered by the Carle Administration for each opening in the position of elementary school principal. Each year, the Carle Administration appointed individuals to such openings whom they believed to be more qualified than Plaintiff.

13. In March of 1974, Plaintiff applied for a principalship at the elementary level for the 1974-1975 school year. Her name was placed on an eligibility list along with the names of 61 other individuals who had applied for the same position (Joint Exhibit 14).

14. Due to cutbacks imposed by the Maxwell Administration, Plaintiff's position as unit facilitator was eliminated for the 1974-1975 year and she was offered a contract as teacher, which would result in a $5,000.00 paycut. In April 1974, Plaintiff wrote to Defendant Maxwell concerning her problem. She explained the mix-up which had resulted in her being given a position as unit facilitator and her desire not to experience a paycut. She stated that she wished to become a principal, but since it was unlikely that a principalship would be open for the next year, she would like to remain as a supervisor in the Instruction Department.

15. In June Plaintiff met with Mr. Maxwell for an interview concerning the position of principal. During the interview, Mr. Maxwell discussed with Plaintiff her philosophy regarding discipline and particularly the paddling of students. Mrs. Carter's philosophy differed from that of Mr. Maxwell on the subject of discipline and particularly paddling.

16. In July of 1974, Plaintiff filed complaints with the Ohio Civil Rights Commission and the EEOC regarding her inability to advance to a principalship. In her EEOC complaint, Plaintiff alleged that on or about July 18, 1974, the Dayton Board of Education filled two vacant principal positions with males. She further alleged that she was given a classroom teacher contract at several thousand dollars a year less than she had been earning. She concluded that the Dayton Board of Education was discriminating against her because of her sex. Conciliation efforts by those agencies were unsuccessful. On September 23, 1977, Plaintiff was issued a right to sue letter, which formed the jurisdictional basis for filing the complaint in this case.

17. In the 1974-1975 school year, Plaintiff was not demoted to a teacher's position. Rather, she was employed as a school services advisor (SSA) at the Valerie Elementary School performing the same duties as she had the previous year. All former unit facilitators, both male and female, were given positions as SSA's after the unit facilitators' positions were eliminated.[2] At the conclusion for the school year her principal, Alfred Fields, furnished an evaluation of Plaintiff's performance to the Board of Education and recommended that she be considered for a position such as supervisor or principal.

18. In the 1975-1976 school year, Plaintiff was assigned the same duties at Valerie School. In May of 1976, Plaintiff applied for an elementary school principalship and was placed on the eligibility list. She was not selected for the position.

19. In the 1976-1977 school year, Plaintiff was again assigned as an SSA at Meadowdale Elementary School, which already had an assistant principal and a principal. In March of 1977, Plaintiff again applied for a position as Elementary school principal for the following year.

20. In the 1977-1978 school year, all of the SSA positions were eliminated due to "budget cutbacks". Plaintiff was assigned to Whittier Elementary School as a fifth

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2. Although the Board of Education did advise Plaintiff, by letter dated April 26, 1974, that she would be demoted to a teaching position for the 1974-1975 school year, Dayton Board of Education records reflect that Plaintiff was assigned as a school services advisor. (Joint Exhibit XLIX). Plaintiff herself testified that she was employed as a school services advisor at Valerie Elementary School for the 1974-1975 school year. Nevertheless, in her complaint filed December 23, 1977, Plaintiff states that, for the 1974-1975 school year, "Plaintiff was demoted and assigned a classroom teaching job". In the Final Pretrial Order, Plaintiff reiterates this allegation (p. 2, ¶ IV.A.1.(2)). This specious allegation reflects unfavorably upon the credibility of Plaintiff's case.

rade teacher.[3] She was interviewed for administrative positions that year but not appointed to any of them.

21. During the 1974-1975 school year, and in later years, the Dayton schools had been party to a U. S. Department of Health, Education and Welfare staff balance order, which required that the staffs of individual schools must be balanced as to their racial composition. Plaintiff testified that two of her transfers resulted from a desire of the Maxwell Administration to equalize the racial balance in the Dayton school system.

22. Plaintiff's personnel record does not contain unfavorable evaluations of her job performance. In the latest evaluation prior to the 1974-1975 school year, Plaintiff was evaluated at the second highest performance level, having been found to "meet expectations".

23. The testimony is in conflict as to the number of openings for elementary school principalship and the identity of those selected to fill said openings during the school years 1974-1975 through 1976-1977. This is due in part to the lack of foundation evidence introduced to establish the accuracy of the statistical exhibits.[4] However, as best as can be determined from the information available, not more than four principalships were filled with new applicants during the aforementioned time period. Other principalships were open, but were filled by principals transferring from schools which had been closed. Only one new applicant was appointed elementary school principal for the 1974-1975 school year. The statistical evidence also appears to indicate that no women have been appointed

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3. No additional evidence was offered regarding this event, nor did Plaintiff claim that the demotion was discriminatory.

4. See opinion, pp. 16-23.

as elementary school principal by the Dayton Board of Education from 1972 to the present time.[5]

24. During the 1972-1973 school year, a women's rights committee was formed by the Carle Administration to examine "sex bias and discrimination which might exist in Dayton schools". The committee issued two reports, Joint Exhibits XXXVII and XXXVIII. The Carle Administration did not implement any of the recommendations contained in either of the reports. The issuance of the final report in July 1973 completed the committee's task. However, the committee chairperson, Joyce Kaser, wrote to incoming Superintendent Maxwell and requested that he continue the committee. Mr. Maxwell preferred to form his own committee and did so.

25. The Maxwell Administration's women's rights committee for the 1973-1974 school year included Jeanette Youngerman as "Chairer", Kathleen Armstrong, Laprecious Branche, James Eschbach, Carol Foreman, Ed Jones, Tommie Jones, Mrs. B. Kiser, Mary Lower, Jeana Ruzic, Jo Stewart, Ruth Storck, and Daisy Torrance.

26. On April 15, 1974, the women's rights committee issued a report and requested that the recommendations contained in the report be implemented immediately. One of those recommendations was that "the persons making selections (for administrative positions) actively seek qualified persons leading toward a more equitable sex balance". It was recommended that the Staff Development Department issue a "letter of concern" to all professional staff members indicating the need for women qualified in educational administration. A substantial portion of the report was devoted to women's rights in athletics. A specific recommendation was that qualified women be recruited to fill coaching positions. The Maxwell Admin-

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5. See opinion, p. 23.

istration implemented all the recommendations of the women's rights committee, including the appointment of the first woman high school basketball coach in the State of Ohio.

27. The Maxwell Administration promoted the following women to the following administrative positions:[6]

Name	Position
Doris Brown	Principal
Serepta Anderson	Assistant Principal
Darlene Bandrofchak	Assistant Principal
Jean Booker	Principal
Jean Hutson	Assistant Principal
Jean Hobson	Assistant Principal
Sallee Gregory	Charge of Teacher Corp.
Mary Hiatt	Assistant Principal
Susan Kurczewski	Public Information Officer
Alice Leahy	Assistant Principal
Elizabeth Vincent	Assistant Principal
Brenda Lee	Affirmative Action Officer
Mildred McElroy	Assistant Principal
Mildred McGill	Assistant Principal
Alberta Minor	Title VII Coordinator
Mildred Patterson	Director of Title VII Programs
Ruth Richardson	Guidance Counselor
Helen Moorman	Assistant Principal
Katherine Davis	Affirmative Action Director
Elizabeth Davis	Assistant Principal
Eloise Swann	Title VII Coordinator
Daisy Torrance	Supervisor of Language Arts
Lucinda Adams	Supervisor of Girls Phys. Ed.
Barbara Mims	Practical Nurse Director
Nancy Thickel	Public Information Officer
Marge Schemmel	Supervisor of Nurses
Doris Black	Coach of Boys Basketball Team

6. Spelling of names as per official transcript.

28. Each year the Maxwell Administration posted openings in administrative positions, including principalships, and the names of those applying for the opening were placed on a list. The applicants were screened by an administrative committee and a certain number were chosen for interviews. Each year in which Plaintiff applied for the position of principal, she did not place among those at the top of the list. In some years she was not among the final candidates selected for interviews.

29. Mr. Maxwell received the list of final candidates from the Assistant Superintendent in Charge of Administration, after determination was made that all persons on the list were qualified. Mr. Maxwell then checked the personnel files of those individuals on the list and contacted the principal at the school where each individual had been employed to obtain a recommendation. He also sought recommendations from the community where the individual had worked. He discussed each promotion at his cabinet meeting.

30. In determining who would be selected for a principalship, Mr. Maxwell considered a number of factors including leadership, training, ability to get along with parents and teachers, knowledge of the curriculum, ability to discipline both students and staff, ability to control finances in a particular school, and ability to supervise extracurricular activities. He also attempted to match the individual characteristics of the person to those of the school and the community where the opening existed. Detailed descriptions existed for administrative positions including supervisor, elementary assistant principal and elementary principal. There is nothing in the descriptions themselves which can be inferred to be in any way discriminatory.

31. Two years ago the process for selection of individuals to fill administrative positions changed. The best qualified job applicants were interviewed by four to six administrators who then referred the best two or three individuals to Superintendent Maxwell for interview. During the last two years, Plaintiff was eliminated in the screening process and her name was not on the list submitted to Superintendent Maxwell.

32. Since the time Mr. Maxwell became superintendent, his administration has had to close ten school buildings. Each time this occurred, a principal or assistant principal would be transferred in order to provide them with employment. A number of open principalships were filled by principals transferred from closed schools.

33. The individuals selected for new elementary school principalships for the 1974-1975 through 1976-1977 school years were, under the legitimate criteria utilized by the Maxwell Administration, well-qualified for the positions.

OPINION

Plaintiff has the burden of establishing by a preponderance of the evidence that she was discriminated against because of her sex. Plaintiff may establish a prima facie case by showing:

(a) that she is a female;

(b) that she applied for and was qualified for a job for which the employer was seeking applicants;

(c) that she was not selected by the employer; and

(d) that the position remained open and was ultimately filled by a person of Plaintiff's qualifications or of lesser qualifications.

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); *Furnco Constr. Corp. v. Waters*, ... U.S. ....., 46 L.E. 4966 (1978).

The establishment of a prima facie case of disparate treatment raises an inference of discriminatory animus on the part of Defendants because it is presumed that Defendants' acts are more likely than not based on the consideration of impermissible factors. *Furnco Constr. Corp. v. Waters, supra.*

In connection with establishing her prima facie case, Plaintiff is permitted to introduce evidence of possible discrimination taking place prior to, and subsequent to, the time period in question, in order to support the inference that such alleged unlawful conduct continued through the pertinent time period. *Hazelwood School District v. United States*, 433 U.S. 299 (1977); Fed. R. Evid. 406.

Once Plaintiff has established a prima facie case, the burden of going forward shifts to Defendants to articulate some legitimate, non-discriminatory reason for their actions. *Furnco Constr. Corp. v. Waters, supra.* Once such a reason is articulated, Defendants have no further burden. The burden of going forward then shifts back to Plaintiff to establish that the reason given by Defendants is pretextual. The ultimate burden of persuasion on the issue of discrimination always remains with Plaintiff, who must convince the Court by a preponderance of the evidence that she has been the victim of discrimination. *Board of Trustees v. Sweeney*, ... U.S. ....., 47 L.W. 3015 (1978).

Although the credibility of Plaintiff's case-in-chief suffered by her failure to offer evidence regarding three of her four discrimination allegations, and by the fact that

two of the allegations are obviously inaccurate,[7] we find that Plaintiff did make out a prima facie case of discrimination as follows:

Plaintiff's evidence established (1) that she was a female; (2) that, in 1974, she applied for and was qualified for the position of elementary school principal, a job for which Defendants were seeking applicants; (3) that she was not selected for said position; and (4) that the position remained open and was ultimately filled by a person of Plaintiff's qualifications or of lesser qualifications.[8] Thus, Plaintiff established a prima facie case as envisioned by the Supreme Court in the *McDonnell-Douglas, Furnco* and *Sweeney* cases by introducing evidence sufficient to shift the burden of going forward to Defendants to articulate the reason for their actions.

Defendants' Burden
of Going Forward

Defendants, both by the testimony they introduced in their case-in-chief, and by the testimony of Plaintiff's own witnesses, met their burden of articulating a legitimate, non-discrimatory reason for failing to promote Plaintiff to elementary school principal for the 1974-1975 year.

Only one new principal, John Pontisso, was appointed by the Maxwell Administration for the 1974-1975 school year in either the elementary or secondary schools. Mr. Pontisso had been an assistant principal for seven years at the time he was appointed principal at Belle Haven Elementary School. He was assistant principal at Belle

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7. See page 1 and footnotes 1 and 2, pp. 2 and 6, supra.

8. At trial, Defendants conceded that Plaintiff had established this element of her case because she held an elementary principal's certificate. For the purpose of this opinion, the concession will be accepted without further examination.

Haven during the three years immediately preceding his appointment. Mr. Maxwell had been principal at Meadowdale High School and had observed students who had originally attended Belle Haven during the time Mr. Pontisso was assistant principal. Mr. Maxwell also had learned from parents of the students at Belle Haven that they were impressed by the way Mr. Pontisso handled students. Mr. Maxwell was also impressed with the manner in which Mr. Pontisso handled discipline problems at the school. Mr. Maxwell stated that he did not believe that Mr. Pontisso had any weak points.

On the other hand, there were reasons why Plaintiff was not considered a leading candidate. Plaintiff had extensive experience with implementing new teaching programs, while Mr. Maxwell favored a "Back to Basics" system. Mr. Maxwell felt that he and Plaintiff differed on their philosophy concerning discipline and the paddling of students. He had been informed that Dr. Graham had taken unfavorable information out of her file. He was also informed that she had a number of problems working at the Fairport school and that the principal, Mrs. Wellesley, had asked that she be transferred. He was told by Mrs. Bullock, principal of Shiloh Elementary School that, when Plaintiff was assistant principal there, she had difficulty disciplining the students. He felt Plaintiff had "very fine curriculum ability but very poor ability to handle students". He believed she delegated too many tasks to others. Furthermore, Mrs. Carter did not have the familiarity with the Belle Haven School and staff that Mr. Pontisso did. Thus, Defendants met their burden of articulating a legitimate reason for the appointment of Mr. Pontisso for the 1974-1975 school year.

The evidence conflicts as to the number and identity of persons newly appointed to elementary school principal-

ships during the next two years.[9] Although the Defendants did not have the burden of articulating legitimate reasons for appointments during these years, they undertook to do so. We find that the reasons given with respect to the appointment of Mr. Nilsen and Mr. Staten were legitimate and not related to discrimination.

With respect to John Hertvik, who may have been appointed in the 1975-1976 school year, Defendants offered no testimony because they contended no appointment was made that year. However, Mr. Hertvik's personnel file[10] reflects that he has a Bachelor of Science Degree from the University of Dayton and a Masters Degree in Education from Wright State University. Mr. Hertvik had been an assistant principal for three years at MacFarlane Middle School. His performance appraisal for the 1973-1974 school year was higher than that of Plaintiff's. Mr. Hertvik was rated to "exceed expectations" in each area of the appraisal, which was prepared by his principal, Jewell T. Bates. Therefore, if Mr. Hertvik was in fact appointed principal in 1975, the documentary evidence shows him to have been well qualified for that position.

Plaintiff's Burden to Prove by Preponderance of the Evidence That Defendants' Reasons Were Pretextual and That She Was the Victim of Sexual Discrimination

Plaintiff offered no evidence at trial to rebut Defendants' case-in-chief. Rather, Plaintiff relied on the evidence already presented during her case-in-chief. In particular, Plaintiff offered no affirmative evidence to attempt

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9. See opinion, page 22. As best as can be determined not more than three new applicants were promoted to elementary school principalships for the 1975-1976 and 1976-1977 school year.

10. Joint Exhibit L.

to establish that Mr. Pontisso was less qualified for the position of principal than she. Nor did Plaintiff offer affirmative evidence regarding the lack of qualifications of other individuals promoted to the position of principal. Plaintiff offered no evidence to establish that the reasons given by Mr. Maxwell for not appointing her were pretextual.

In order to establish her burden of persuasion, Plaintiff relied heavily upon the statistical evidence introduced at trial. We do not find the statistical evidence relied upon by Plaintiff to be sufficient to carry her burden of persuasion by a preponderance of the evidence for the following reasons.

Reliability of the Statistical Evidence

Statistical analyses may serve an important role in cases in which the existence of discrimination is a disputed issue. *Teamsters v. United States,* 431 U.S. 324 (1977). Discrimination is seldom proven by direct evidence and is most often proven by reasonable inferences to be drawn from the facts of the case, including statistical analyses. In many cases the only available avenue of proof is the use of statistics to uncover clandestine and covert discrimination by an employer. *United States v. Iron-Workers Local 86,* 443 F.2d 544, 551 (9th Cir. 1971). However, a word of a caution is necessary when attempting to interpret statistics:

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances. *Teamsters v. United States* at 340, *supra.*

In order for statistical data to be meaningful, a proper and logical analysis must be made. In the instant case, Plaintiff has urged that a comparison of the relative percentages of males and females in the total work force of the Dayton Board of Education to the relative percentages of males and females appointed to elementary principalships from the period October 1973 to October 1977, shows a gross disparity from which discrimination should be inferred. Such a conclusion is the result of a fundamental misconception of the role of statistics in employment discrimination cases. The "total employee work force" may contain substantial numbers of female employees in such positions as cafeteria workers, janitorial staff, etc., none of whom are qualified for appointment as elementary school principal. Inclusion of these females in the statistical analysis could lead to an inaccurate result.

The appropriate comparison is one between the sexual composition of the *qualified applicants* for elementary principalship and the sexual composition of the newly appointed elementary school principals during the relevant time period. See, *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977). Plaintiff has neither attempted to make the above comparison, nor has she submitted evidence from which such comparison could be made. (See p. 23, infra).

Furthermore, the reliability of the statistical information contained in the Joint Exhibits has not been established. At trial, the parties agreed to the authenticity of the Joint Exhibits containing documents of the Dayton Board of Education.[11] Documents containing statistical in-

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11. Joint Exhibits XXXII, XXXIV, XXXVII, XXXVIII, and Defendants Exhibits A and B are primarily relied upon by the parties as containing the statistical information to support their theories.

formation relied upon by both parties were offered into evidence as "business records" and no objection was made to their admissibility (Tr. 217-282). The parties did not stipulate the accuracy of the information contained within the records.

In order to qualify as a business record, and thus be admissible as an exception to the hearsay rule, the document must be:

> a memorandum, report, record, or data compilation, in any form, of acts, of events, conditions, opinions, or diagnoses, *made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation,* all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. Fed. R. Evid. 803(6) (emphasis added).

In order for a document to come within the business record exception to the hearsay rule, it must be made in the systematic conduct of a business, made as a matter of routine, and made to reflect regular business transactions. *Palmer v. Hoffman,* 318 U.S. 109 (1943). It is the regularity and routine of keeping the records for the purpose of operating the business which tends to establish the trustworthiness of the records. *United States v. Graham,* 391 F.2d 439 (6th Cir. 1968). No testimony was introduced to establish the aforementioned facts concerning the Joint Exhibits in question. In fact, from the evidence available, and from an examination of the exhibits themselves, it appears that each of the statistical documents were prepared in the course of an unusual activity under-

taken for one purpose only, as opposed to a regularly conducted business activity.

Testimony must also be given by a custodian adequately authenticating the record's accuracy and explaining the efforts employed to ensure this accuracy. No such testimony was presented in this case. *United States v. Blake*, 488 F.2d 101 (5th Cir. 1973). Furthermore, no evidence was introduced to establish that the records were made at or near the time of the events described in the record. To the contrary, it appears in each case that the record was not in fact made at the time of the events therein described, but at a much later time.

It is the circumstances under which the records are recorded, kept, maintained and used that establish the reliability essential to the law's conclusion that, without any independent recollection by those who made the succession of entries, they are reliable, because the business itself relies on them for important business judgments. *Bridger v. Union Railway Company*, 355 F.2d 382 (6th Cir. 1966). Evidence of such circumstances was never introduced in this case.

The existence of the documents in the file of the company does not, without more, render it admissible as a business record. *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957). Nor do the documents meet the exception for public records and reports under Fed. R. Evid. 803(8).[12]

The minimal evidence available concerning the documents indicates they are not business records, but are summaries of other records of the Dayton Board of Education, and that they were prepared for a specific purpose. The

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12. The only Joint Exhibits offered as public records were Exhibits XL-XLIII, minutes of the Board of Education.

women's rights committees' reports[13] were prepared by the members of that committee for the purpose of expanding the rights of women in the Dayton Board of Education. The analyses of appointments of individuals to the positions of principal and assistant principal since 1972[14] were apparently prepared for study by officials of the Board of Education to analyze the racial and sexual composition of the administrative staff. The Chronological History of Principal and Assistant Principal Appointments[15] were prepared for the purpose of litigating this case.

The women's rights committees' reports were identified by the author, Joyce Kaser. Ms. Kaser was not asked how the statistical information and the subjective conclusions contained in the reports were compiled, with the exception of the statistics contained on page 8, ¶ 5 of Joint Exhibit XXXVIII. With respect to the latter, she stated "all the employment data I obtained from the Personnel Department through Dr. Thomas Graham". Dr. Thomas Graham was called as a witness for Plaintiff, but was not questioned concerning the two women's rights committee reports. Both reports contain conclusions which are highly subjective in nature, but no evidence was introduced as to what information these conclusions were based upon.

With regard to the exhibits analyzing the sexual and racial composition of principals and assistant principals appointed since June 1972, the most extensive examination on this subject was that of Mr. William Harrison, with respect to Joint Exhibit XXXIV. Mr. Harrison testified that he was familiar with the exhibit and stated that "this was prepared, I am of the opinion, by a secretary in my

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13. Joint Exhibits XXXVII and XXXVIII.
14. Joint Exhibits XXXII and XXXIV.
15. Defendants' Exhibits A and B.

office and one in Mr. Weinman's office. I wanted to be able to use this, as you said, make an analysis of both race and sex as to the changes in our administrative staffs." Mr. Harrison was never questioned as to the source of the information contained in the exhibits, nor as to the manner of its compilation. In fact, in his testimony, he questioned the accuracy of the information contained therein.

Defendants Exhibits A and B were identified by Mr. Paul Ressler as "statistical figures that were prepared several weeks ago at my direction by Mrs. Balas, my secretary". It was further established that the exhibits were prepared from records maintained in Mr. Ressler's office at the request of Defendants' attorney. However, the "records" referred to were never identified. Nor did Mr. Ressler explain the manner by which the information contained in the records was summarized by his secretary. Documents which are prepared for use essentially in litigating a claim are particularly suspect. *Trout v. Pennsylvania Railroad Co.*, 300 F.2d 826, 830 (3rd Cir. 1962).

All of the above-described documents are clearly summaries of other records of the Dayton Board of Education. The use of summaries of voluminous materials in cases where the original evidence cannot be conveniently introduced is a matter within the discretion of the trial court. See, Fed. R. Evid. 1006. Certain criteria have evolved to guide a court in exercising its discretion. A proper foundation must be laid with reference to the admissibility of the originals. Furthermore, it must be shown that the summation accurately summarizes the materials involved by not referring to information not contained in the original. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3rd Cir. 1961). Because no testimony was introduced concerning the nature of the source from which the information was gathered for these reports, nor the manner

in which they were compiled, they do not have any evidentiary value. *Bogacki v. American Machine & Foundry Company*, 417 F.2d 400, 407-408 (3rd Cir. 1969).

During trial, the Magistrate specifically indicated to the parties that, although the Joint Exhibits would be admitted because no objection was made, there was a question as to whether any evidence had been introduced to explain the documents.[16]

In addition to the failure of the parties to establish the reliability of the information contained in the aforementioned exhibits, examination of the exhibits themselves raises a question as to the reliability of the information contained therein. A careful reading of the exhibits reflects that the statistical conclusions contained in them are inconsistent and contradictory.

For example, Defendants' Exhibit A and Joint Exhibit XXXII indicate that no new promotions were made to principalships during the 1975-1976 school year. However, Joint Exhibits XXXIV and L indicate that John Hertvik was appointed principal at Grant Elementary School for that year. Defendants have taken the position that no new promotions to an elementary school principalship were made for the 1975-1976 school year, while Plaintiff claims that John Hertvik was appointed to such position.

Another example involves Defendants' Exhibit A, which indicates that three new appointments were made to elementary school principalships for the 1976-1977 school year. However, Joint Exhibits XXXII and XXXIV indicate that only two new principal appointments were made that year in elementary schools.

This is not a matter of the Court attempting to determine the credibility of witnesses. Rather, this is a mat-

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16. See Tr. 215 through 219.

ter of irresolvable conflicts in documents, which emphasize the unreliability of the documents. Where Plaintiff relies upon the information contained in said documents to carry her burden of persuasion, Plaintiff is obliged to satisfy the Court that such information is reliable. Plaintiff has not met this obligation.

The statistical information contained in the aforementioned exhibits must be rejected for yet another reason. Assuming the statistics to be reliable, they reflect that only four persons were newly promoted to the position of elementary school principal during the school years 1974-1975 through 1976-1977.[17] Evidence has not been introduced to establish either the number of persons applying for such positions each year, or the sexual composition of the applicants.[18] We do not feel that any reliable conclusion can be drawn from the apparent fact that four males and no females were appointed to the position of elementary school principal over a three year period. Statistical evidence derived from an extremely small universe, as in the present case, has little if any predictive value and should be disregarded. *Mayor v. Educational Equality League*, 415 U.S. 605 (1974); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975).[19]

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17. This determination is a hypothetical one, based upon the highest number of appointments which were apparently made. It is impossible to make an accurate determination due to the unreliability of the statistical evidence and the direct conflicts therein.

18. Joint Exhibit XXXIII is entitled "List of People Who Applied for Principalships Since 1972". No evidence was introduced to either authenticate or explain the information contained in this exhibit. The exhibit is not self-explanatory.

19. Plaintiff has also alleged that no females have been appointed to the position of elementary school principal since 1972 and has relied on the statistical exhibits to support that claim. However, due to the unreliability of the statistical evidence, this fact is not altogether clear. Furthermore, there is no reliable evidence from which to determine the size of the statistical sample of those actually appointed to elementary principalships since 1972 in order to determine if it is meaningful.

Non-Statistical Evidence of Discrimination

Plaintiff offered no evidence tending to establish that those individuals promoted to an elementary school principalship were less qualified than she. Rather, Plaintiff relied on her allegation that Defendants failed to carry their burden of going forward to explain a legitimate reason for the promotion of those individuals. The evidence establishes that those promoted were well-qualified for the position, and that Plaintiff also was well-qualified for the position.

Although the relative qualifications of individuals for appointment to a position are considered by the Court in determining whether Plaintiff has established a prima facie case, it is not the function of the Court to determine ultimately which individual was most qualified for the position during each year in question. To do so would simply substitute the judgment of the Court for the judgment of the Board of Education, a result which would not be proper.[20] See, *Flucker v. Fox Chapel School District*, ... F.Supp. ....., 18 FEP 1509 (W.D. Pa. 1978).

In the selection of an elementary school principal, as with any other professional position, the considerations over and above the minimum qualifications must be largely subjective. An applicant's academic accomplishments are not the sole criteria for judgment. The fact that such considerations are subjective results in a closer scrutiny of them by the courts to determine whether there is any evidence of discriminatory animus. Where no such evidence is found, there is no basis for a finding that discrimination existed simply because subjective criteria were

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20. Neither the Constitution nor the Civil Rights Act of 1964 is a guarantee against incorrect or ill-advised personnel decisions. *Bishop v. Wood*, 426 U.S. 341, 350 (1976).

considered in making the decision. *Julian v. City of Knoxville,* 458 F.Supp. 16 (E.D. Tenn. 1978). See also *Senter v. General Motors Corp.,* 532 F.2d 511 (6th Cir. 1976), *cert. den.* 429 U.S. 870.

The evidence in this case established that, for the 1974-1975 school year, the decision to promote an individual other than Plaintiff to the position of elementary school principal was entirely legitimate and non-discriminatory. The evidence of Defendants' actions in prior years and subsequent years did not tend to establish a discriminatory motive on the part of Defendants. In each of those years Plaintiff was fairly considered for the position in question, but was rejected in favor of candidates whom the Maxwell Administration believed to be better qualified for bona fide, non-discriminatory reasons, as articulated during the trial.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this case, in accordance with 42 U.S.C. § 2000e, et seq. All appropriate jurisdictional prerequisites have been met by Plaintiff.

2. Title 42 U.S.C. § 2000e, et seq. prohibits discrimination against Plaintiff with respect to compensation, terms, conditions or privileges of employment because of Plaintiff's sex. The statute also proscribes the denial to Plaintiff of an equal opportunity to qualify for promotions.

3. Plaintiff claims that, during the 1974-1975 school year, Defendants discriminated against her because of her sex by refusing to appoint her to the positions of principal and assistant principal, by demoting her to the position of teacher, and by maintaining a salary system which resulted in unequal treatment of females. At trial, the only claim upon which Plaintiff offered evidence was her claim that

she was denied a principalship because of sex discrimination.

4. Plaintiff has introduced sufficient evidence to establish a prima facie case from which an inference of sexual discrimination may be drawn.

5. Defendants have met their burden of going forward by articulating legitimate, non-discriminatory reasons for not promoting Plaintiff to the position of elementary school principal during the 1974-1975 school year.

6. The statistical evidence upon which Plaintiff relies has not been shown, under appropriate legal standards, to be sufficiently reliable to form a basis for any findings of fact.

7. Assuming, arguendo, that the statistical evidence is reliable enough to support factual findings, the statistical sample from which Plaintiff seeks to infer discrimination is extremely small and has little, if any, predictive value. Furthermore, Plaintiff's analysis of the statistical data is not a valid one.

8. Plaintiff has failed to meet her burden of persuading the Court, by a preponderance of the evidence, that Defendants refused to promote her to an elementary school principalship because of her sex.

RECOMMENDED DECISION

IT IS THEREFORE RECOMMENDED THAT:

Plaintiff Iris Carter take nothing upon her Complaint and that judgment be entered in favor of the Defendants, John Maxwell and the Dayton Board of Education.

/s/ ROBERT A. STEINBERG
United States Magistrate

Date: February 14, 1979

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 21, 1978)

Civil No. C-3-77-438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

v.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendants.

ORDER

This matter is before the Court upon defendants' motion pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., to dismiss various allegations of plaintiff's complaint.

I

Defendants assert that 20 U.S.C. §1681, upon which plaintiff has invoked jurisdiction in Count II of the complaint, does not create a private right of action for redress of employment discrimination. We agree.

In *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976), the Seventh Circuit reached this conclusion after an extensive examination of the statute and legislative history. Judge Porter of this Court rendered a similar

decision in *Leake v. University of Cincinnati*, 14 F.E.P. Cases 1 (No. C-1-76-315, S.D. Ohio, September 16, 1976). Plaintiff has failed to adequately distinguish these cases from the instant action, and has provided no persuasive precedent in support of a contrary conclusion.

II

Defendants further assert that plaintiff's claims against Defendant Maxwell are barred by his immunity from liability for exercise of discretionary official acts. This assertion is without merit. It is clear from the complaint and plaintiff's memorandum that defendant Maxwell has not been sued individually, but only in his official capacity.

III

Since plaintiff has dismissed her class action allegations, defendants' motion in this regard is now moot.

IV

Defendants' final assertion is that plaintiff's equal pay allegations are "false and erroneous". This raises an essentially factual issue which the Court is unwilling to dispose of upon mere motion and affidavits.

Accordingly, defendants' motion to dismiss Count II of plaintiff's complaint is hereby GRANTED; defendants' motion to dismiss plaintiff's claims against defendant Maxwell is hereby DENIED; defendants' motion to dismiss plaintiff's equal pay allegations is hereby DENIED; defendants' motion to dismiss the class action allegations is MOOT. Count II of plaintiff's complaint is hereby DISMISSED.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

Office-Supreme Court, U.S.
FILED
AUG 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2138

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

IRIS CARTER,

Petitioner,

v.

DAYTON BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title IX of the Education Amendments of 1972, Title 20 U.S.C. § 1681, applies to claims of sex-based employment discrimination.

2. Whether the lower court accurately analyzed the facts of this case under the allocation of burdens and order of presentation of proof in a Title VII disparate treatment case, as set forth by this Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and as clarified in *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978), *Board of Trustees* v. *Sweeney,* 439 U.S. 24 (1978), and *Texas Department of Community Affairs* v. *Burdine,* —— U.S. ——, 101 S.Ct. 1089 (1981).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2138

IRIS CARTER,

Petitioner,

v.

DAYTON BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

Respondents, Dayton Board of Education and John B. Maxwell, respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in this case on March 17, 1981, be denied.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are Section 901 (a) of Title IX of the Education Amendments of 1972, Title 20 U.S.C. § 1681 (a), cited at pages 2 through 5 of the Petition, and Section 703 (a) of Title VII of the Civil

Rights Act of 1964, as amended, Title 42 U.S.C. § 2000e-2 (a), cited at pages 5 and 6 of the Petition.

STATEMENT OF THE CASE

The Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in the summer of 1974, alleging sex discrimination in employment by the Dayton Board of Education as a result of its failure to appoint her to the position of elementary principal. The Department of Justice issued a right to sue letter to the Petitioner on September 23, 1977, and Complaint was filed on December 23, 1977, containing both individual and class action allegations of discriminatory employment practices on the part of the Respondents. The Court's jurisdiction was invoked under Title VII of the Civil Rights Act of 1964, as amended, Title 42 U.S.C. § 2000e, et seq., and under Title IX of the Education Amendments of 1972, Title 20 U.S.C. § 1681. The Petitioner amended her Complaint on March 24, 1978, deleting the class action allegations, and the Court dismissed the Title IX allegations in an order entered June 21, 1978.

The case was tried to United States Magistrate Robert A. Steinberg on November 6 and 7, 1978. The single issue was whether the Petitioner was denied appointment to the position of elementary principal because of her sex. The Report and Recommendation of the Magistrate was filed on February 14, 1979, recommending that judgment be entered in favor of the Respondents. Petition, A. 8-35. After a review upon motion of the Petitioner, the United States District Court for the Southern District of Ohio accepted the Magistrate's recommendation and dismissed the Petitioner's Complaint. Petition, A. 6-7. The Petitioner

appealed to the Sixth Circuit Court of Appeals, and judgment affirming the decision of the District Court was entered on March 17, 1981. Petition, A. 1-4.

REASONS FOR DENYING THE WRIT

I. There is no novel Title IX issue presented by this case, nor would a decision that Title IX applies to claims of sex-based employment discrimination alter the result in this case.

Petitioner presents a twofold argument in support of her contention that a writ of certiorari should be granted in this case as a result of the dismissal of the Title IX claim in the courts below. First, the Petitioner states that the Court has granted petitions for certiorari in two cases involving the question of whether § 901 (a) of the Education Amendments of 1972 (Title IX) applies to claims of employment discrimination on the basis of sex in federally funded educational programs. *Seattle University* v. *H.E.W.*, 621 F.2d 992 (9th Cir. 1980), *cert. granted*, — U.S. —, 101 S.Ct. 563 (1980); *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *cert. granted*, — U.S. —, 101 S.Ct. 1345 (1981). The Petitioner argues that the decision in those cases will affect the outcome of the instant case, and thus the Petitioner seeks deferral of a decision in this case pending a ruling in *Seattle University* and *North Haven*. Second, the Petitioner contends that the petition in this case presents a supplemental issue to those in the *Seattle University* and *North Haven* cases, with respect to whether a private right of action exists under Title IX for the redress of gender-based employment discrimination. On that basis, the Pe-

titioner asks this Court to consider this case with those already pending before it. Neither ground upon which certiorari is sought is sufficient. Resolution of the *Seattle University* and *North Haven* cases in favor of application of Title IX to claims of sex-based employment discrimination would not alter the result in the instant case. In addition, the Supreme Court has already decided the so-called "supplemental issue" concerning the existence of a private right of action under Title IX in *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979).

No useful purpose would be served in this case by deferring ruling pending determination of the *Seattle University* and *North Haven* cases. Assuming for the sake of argument that the Court decides in *Seattle University* and *North Haven* that Title IX applies to sex-based claims of employment discrimination, there would be no difference in outcome of the instant case. Plaintiff's Complaint alleged violations of both Title VII and Title IX. Although the Title IX aspect was dismissed, the case was tried on its merits under Title VII, and judgment was entered in favor of Respondents. If the Petitioner could not satisfy the burden of proof under Title VII, neither could she satisfy the Title IX burden of proof. On remand from the Supreme Court, the District Court in *Cannon* v. *University of Chicago,* — F.Supp. —, 26 EPD ¶ 31,822 (N.D.Ill. 1981), held that Title IX, like Title VI, proscribes only those classifications that would violate the Equal Protection Clause of the Fifth Amendment, and therefore, a violation of Title IX would require a finding of intentional discrimination. Likewise, the third prong in the tripartite allocation of burdens and order of presentation of proof in a case alleging discriminatory treatment under Title VII requires that the plaintiff persuade the court that she was the "victim of intentional discrimination." *Texas*

Department of Community Affairs v. *Burdine,* — U.S. —, 101 S.Ct. 1089, 1096 (1981). This the Petitioner was unable to do in the courts below. There is, therefore, no reason to defer ruling on this case pending determination of the *Seattle University* and *North Haven* cases.

In *Cannon* v. *University of Chicago,* 411 U.S. 677 (1979), this Court resolved the issue of whether a private right of action exists under Title IX. *Cannon* involved an applicant for admission to medical school who contended she was denied admission because she was a woman. Title IX does not expressly authorize a private right of action by a person claiming to be aggrieved under that statute. In determining that a private right of action can properly be implied under Title IX, the Court restated the factors set forth in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975).

1. Does the statute create a federal right in favor of the plaintiff?
2. Is there any explicit or implicit indication of legislative intent to create such a remedy or to deny one?
3. It is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

The Court, after discussion of these factors in the Title IX context, concluded that a private right of action exists for students claiming discrimination in admissions on the basis of sex. The issue which remains undecided is whether employees, as well as students, are members of the class for whose especial benefit Title IX was enacted. That is-

sue, the first of the *Cort* tests, will necessarily be resolved in the *Seattle* and *North Haven* cases. If Title IX reaches employment discrimination in federally funded education programs, then on the basis of *Cannon,* employees as well as students would have a private right of action under that statute. There is, thus, no novel issue presented by the instant case which militates in favor of issuance of a writ of certiorari.

II. The decision of the lower court is fully consistent with this Court's decisions concerning the burden of proof in a single plaintiff Title VII case.

This Court announced a three-pronged approach to the allocation of burdens and order of presentation of proof in a Title VII disparate treatment case, in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). The initial burden is on the plaintiff to establish a prima facie case of discrimination. Although the specifics of the burden vary under differing factual situations, the burden was held to be satisfied in the instant case by a showing (i) that the Plaintiff is a female; (ii) that she applied for and was qualified for a job for which the employer was seeking applicants; (iii) that despite her qualifications, she was rejected; and (iv) a male was ultimately selected. This Court described the Plaintiff's initial burden in *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 576 (1978), as follows:

> [A] Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'

The second prong of the *McDonnell-Douglas* approach would then shift the burden of production to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802. *Furnco* made it clear that this obligation is not absolute, but rather that the employer need only show that its actions or procedures are reasonably related to the achievement of some legitimate purpose. 438 U.S. at 578. *See also Board of Trustees* v. *Sweeney*, 439 U.S. 24, 25 (1978). This Court further explained the nature of the employer's burden in *Texas Department of Community Affairs* v. *Burdine*, — U.S. —, 101 S.Ct. 1089, 1095 (1981), as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . [citation omitted]. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

The lower court held that the employer had met this burden of production in the instant case, resulting in a rebuttal of the presumption raised by the Plaintiff's prima facie case. Since the burden of persuasion remains at all times on the plaintiff, following the employer's articulation of a nondiscriminatory reason for the Plaintiff's rejection, the Plaintiff then must have an opportunity to demonstrate that the reason stated by the employer was not the true reason for the employment decision. According to *Burdine*, "this burden . . . merges with the ultimate burden of persuading the court that [the plaintiff]

has been the victim of intentional discrimination." —— U.S. ——, 101 S.Ct. at 1096. It was this burden which the Petitioner failed to meet. A review of the evidence failed to persuade the trier of fact, and two reviewing courts, that the Petitioner herein was the victim of intentional discrimination.

A. The Claimed Factual Errors Relating to Pretext

The Petitoner cites examples of what it considers to be factual errors in the opinions of the courts below, which it contends hampered the Petitioner's ability to prove pretext. A review of those examples clearly shows the misleading nature of the Petitioner's argument. In Finding of Fact No. 21, the Magistrate stated that the "Plaintiff testified that two of her transfers resulted from a desire of the Maxwell administration to equalize the racial balance of the Dayton school system." Petitioner, A. 16. The Petitioner argues that this finding is contrary to the evidence because whites were promoted to elementary principalships in 1974. The Petitioner fails to recognize that the Magistrate was not talking about promotions in the disputed finding. Neither was he stating a reason articulated by the Defendants to explain why the Plaintiff was not promoted. The Magistrate was merely restating testimony elicited from the Petitioner at the trial concerning her employment history with the Dayton Public Schools. The Petitioner testified that she "was the wrong color *again* at Valerie and [she] was transferred." [Emphasis Supplied] Transcript, p. 35. The Petitioner further testified that "Dr. Fields, the principal at Valerie School, told me that all three people basically in the office at that building were white. He was white, I was white, and the secretary was white, and I had to be transferred because of that factor of being white." Transcript, p. 36. Since this tes-

timony was not directed at proffered reasons for the Respondents' failure to promote the Petitioner, there can be no claim of error with respect to any failure to consider it in the context of pretextuality.

In Finding of Fact No. 27, the Magistrate listed the women who were promoted during the Maxwell Administration. Petition, A. 18. The Petitioner engages in a substantively meaningless exercise concerning whether the 27 women listed were "initially appointed" or "promoted." The record, on the other hand, clearly shows that John Maxwell was involved in the placement of the women listed to the positions stated. Transcript, pp. 235-42. While Petitioner states that Mr. Maxwell filled twenty principalships with men, the record reflects that during the relevant time period, only four promotions were made to elementary principal, the position sought by the Petitioner. No conclusions can be drawn from such a small number of employment decisions. *See Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 621 (1974); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 340 (1977). The evidence presented to the court below simply does not give rise to any conclusion that Mr. Maxwell was opposed to promotions of women to the position of elementary principal. There is, then, no conflict as asserted by the Petitioner, which if resolved would aid the Petitioner in meeting her burden of persuasion in this case.

The Magistrate stated a number of reasons why the Maxwell Administration did not appoint the Petitioner to the position of elementary principal. Petition, A. 23. The Petitioner's educational philosophy was vastly different from that of Mr. Maxwell, and the two differed on approaches to discipline. The Magistrate also stated that Mr. Max-

well "had been informed that Dr. Graham had taken unfavorable information out of her file" and Mr. Maxwell had been told of problems the Petitioner had with discipline of students. The Petitioner, for some inexplicable reason, asserts that the Magistrate sustained objections to testimony concerning the latter two statements. The following excerpts from the transcript belie that assertion.

> MR. MAXWELL: . . . At Westwood Elementary School, Mr. Waller informed me that Dr. Graham had stripped the files of the documentation which he placed in there asking for her to be transferred.
>
> MR. GUERRIER: Objection, Your Honor.
>
> THE COURT: On what basis?
>
> MR. GUERRIER: Hearsay. He's saying Dr. Waller had informed him that somebody had informed him.
>
> THE COURT: Is this offered to prove the truth of the statement or the fact that somebody had informed him?
>
> MR. NEALE: The fact that he received the information.
>
> THE COURT: If it's offered to prove that was said and he heard it, it's admissible. It will not be considered for the truth of the matter but merely that Mr. Maxwell was so informed. Transcript, p. 244.
>
> * * *
>
> MR. MAXWELL: . . . [W]hen she was the assistant or principal really at Shiloh when the principal became ill, according to the principal, Mrs. Bullock, the following year the teachers informed her that she had many, many problems in the lunchroom, and the students were giving her a

> rough time and that the teachers had to be called in to try to solve the problem there.
>
> MR. GUERRIER: Objection, Your Honor.
>
> THE COURT: The ruling will be the same. It will only be considered for the fact that the statement was made to Mr. Maxwell. Transcript, p. 245.

In fact, the Magistrate considered the evidence exactly as he said he would. The testimony was offered to show Mr. Maxwell's probable state of mind, and it was admissible to shed light on the reasonableness and good faith of his judgment and subsequent conduct. *See* 6 Wigmore, *Evidence,* § 1790 (3d ed. 1940); McCormick, *Handbook of the Law of Evidence,* § 228 (1954). The law does not protect the Petitioner from an evaluation of her performance based on hearsay. None of the feedback received by Mr. Maxwell concerning the Petitioner contained even a hint of impermissible sex considerations. Based on all of the information available to him, Mr. Maxwell simply believed other eligible persons to be more qualified, and this feedback information provides substance to the nonpretextual nature of his legitimate business judgment.

B. The Claimed Evidentiary Errors

The Magistrate recommended and the lower court held that the statistical exhibits presented by both parties at the trial of this action were of no evidentiary value. Petition, A. 25-32. Three reasons were stated in support of that recommendation. First, the two groups of employees which were statistically compared were inappropriate. Second, the reliability of the underlying exhibits had not been established. Third, there had been too few promotion decisions made during the relevant time period in order for the statistics to have any predictive value. For

the first time, the Petitioner is contending that certain of those exhibits were prepared by the Respondents in response to an investigation conducted by the EEOC and HEW. The Petitioner further contends that certain of the exhibits were prepared by the Respondents for trial, and that there were inconsistencies between the latter and those submitted to the EEOC and HEW. The Petitioner argues that such inconsistencies could form the basis for a finding of pretextuality, citing *Burdine,* — U.S. —, 101 S.Ct. at 1096. The Petitioner cites no record support for these bald factual assertions, for indeed none exists. No evidence was presented concerning when, how or why the joint exhibits in question were prepared. This in part formed the basis for the Magistrate's rejection of them. There is not one mention in the entire record of what documents were submitted to the EEOC or HEW. Such inventive albeit futile attempts by the Petitioner to square the facts of this case with the teachings of *Burdine* should not be countenanced.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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